WINTER 2015 NEWSLETTER

COMMERCIAL TRUCKING/AUTOMOBILE LITIGATION UPDATE

By Gerald B. Lotzer

1. *Galveston County Health District v. Erica Hanley* (Tex. Civ. App. – 5th Dist., Dec. 4, 2014).

This lawsuit arises out of an automobile accident that occurred when the vehicle that Erica Hanley was driving collided with a District's 2 ambulance. This is an interlocutory appeal from the trial court's denial of Galveston County Hospital District's plea to the jurisdiction. The Court of Appeals overruled both of the District's issues and affirmed the order of the trial court.

A Galveston County Health District ambulance was responding to a call and entered an intersection against a red light. Prior to entering the intersection, the ambulance driver's line of sight was obstructed by cars, a building and bushes. He could not see if there was oncoming traffic. The driver of the ambulance said that he slowed from 30 miles per hour to less than 10 miles per hour when he entered the intersection and once he spotted Hanley's vehicle, he swerved to avoid it but her car hit the ambulance's right rear wheel well. Hanley brought suit contending that the ambulance was not in the process of responding to an emergency and that the ambulance driver was negligent or, in the alternative, acting with conscious indifference or reckless disregard for her safety and the safety of others.

The District filed a plea to the jurisdiction attaching evidence showing that the ambulance was responding to an emergency call, used its emergency lights and siren, was not speeding through the intersection, but proceeded through slowly with regards to the other motorists. Ms. Hanley acknowledged that the emergency lights were on but she did not "believe" that the siren was on and she did not hear it or recall hearing it. She further testified to her "belief" that the ambulance did not stop or slow before entering the intersection.

The District argued that it was entitled to governmental immunity both under the Emergency Exception of the Texas Tort Claims Act and by virtue of an ambulance driver's official immunity. See, §51.014(a)(8) Tex. Civ. Prac. & Rem. Code; *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007).

The Court stated that a plaintiff must allege facts that affirmatively establish the trial court's subject matter jurisdiction. In determining whether the plaintiff has satisfied this burden they construe the pleadings liberally in the Plaintiff's favor and deny the plea if facts affirmatively demonstrating jurisdiction have been alleged. See, *Holland* at 643; *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227.

When the relevant issue is disputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228. However, if the evidence creates a fact question regarding jurisdiction, then the trial court must deny the plea, and the fact issue will be resolved by the fact finder. *Id.* at 227-228.

The doctrine of governmental immunity, like sovereign immunity from which it derived, protects political subdivisions of the State from lawsuits unless the Legislature specifically waives this immunity. The Tort Claims Act, which provides limited waiver of immunity, applies equally to the State and its political subdivisions. The Act also provides for exceptions to the waiver of immunity. For example, the "emergency exception" provides that immunity is not waived when the employee's act was in response to an emergency call and in compliance with the law or – in the absence of applicable law – not done with "conscious indifference or reckless disregard for the safety of others". The "emergency exception" requires proof that the employee's act was in response to an emergency call and in compliance with relevant law. The Health District provided several affidavits, including an affidavit from the passenger in the ambulance at the time of the accident, that the ambulance was responding to an emergency call for help pertaining to an unconscious and unresponsive woman. Ms. Hanley offered no evidence to controvert the proof that the ambulance was responding to an emergency call. Therefore, the Court held that the evidence was conclusive that the ambulance was responding to an emergency call.

The Court went on to say that for the "emergency exception" to apply, it must be proved that the employee's action in responding to an emergency call was "in compliance with the laws and ordinances applicable to emergency action, or in the absence of such law or ordinance – the action [was] not taken with conscious indifference or reckless disregard for the safety of others." See, §101.055(2) Tex. Civ. Prac. & Rem. Code. The Health District further offered evidence that District Code 2 and Code 3 use both lights and sirens, however, they did not state that lights and sirens were both required here. The description of the practices and the statement that lights and sirens were authorized give rise to a reasonable inference that the District's policy requires both lights and sirens. As stated previously, in a procedural setting, the Court is required to take as true all evidence favorable to Ms. Hanley and indulge reasonable inferences in her favor. Since Ms. Hanley contended that the siren was not being used, she created a question of fact by saying she did not remember hearing a siren. The Court concluded that the evidence that the witness did not hear the siren was "some evidence" that there was no siren to be heard. Standing alone, her subjective belief and failure to recall hearing a siren did raise a general issue of fact on this matter and the Court must resolve doubts in Ms. Hanley's favor. They concluded that her affirmative statement that she "did not hear sirens" was some evidence that there was no siren to be heard.

2. *Andrew Mata v. State Farm Mutual Insurance Company* (Tex. App. – Fourth Dist., Nov. 19, 2014).

This lawsuit arises out of the trial court's granting State Farm Mutual Automobile Insurance Company's ("State Farm") Motion for Summary Judgment asserting that Andrew Mata and Oscar Mata ("Matas") were not entitled to underinsured motorist coverage based on a definitional exclusion contained in the insurance policy. The trial court had granted State Farm's Motion for Summary Judgment and the Matas appealed. The Texas Court of Appeals for the Fourth District affirmed the trial court's judgment.

Melody Cavazos was driving her father's vehicle when she was involved in an automobile accident. Andrew and Oscar Mata were passengers in the Cavazos' vehicle which

was insured by State Farm. State Farm paid out its policy limits on the liability claims, however, denied the uninsured/underinsured motorist claims on the basis that the policy provides that "we will pay damages which a covered person is legally entitled to recover from the owner/operator of an uninsured motor vehicle in case of bodily injury sustained by a covered person, or property damage caused by an accident." The policy contains four definitions of the term "uninsured motor vehicle" as well as a definitional exclusion which states, an "uninsured motor vehicle" does not include any vehicle "owned by or furnished or available for the regular use of [the insured] or any family member." State Farm argued that the vehicle in which the Matas were passengers was furnished for the regular use of Melody Cavazos by her father, who was the insured under the policy.

The Courts interpret insurance policies in Texas according to the rules of contract construction. See, *American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). "If policy language is worded so that it can be given a definite or certain legal meaning, it is not ambiguous and we construe it as a matter of law." *Id.* at 157. When construing the policy's language, they must give effect to all contractual provisions so that none will be rendered meaningless.

The Matas asserted that the trial court erred in granting the summary judgment by ignoring the fourth definition of uninsured motor vehicle, despite the fact that State Farm focused their summary judgment on the definitional exclusion. The Matas never reference this exclusion in their brief or provide any basis on which the exclusion would not apply to the facts of that case. State Farm cited several cases supporting the application of the definitional exclusion, however, the Matas did not discuss either case in their brief or explain why those cases were not applicable. The Court felt like the cases cited by State Farm were virtually identical to the facts in this case and since the Matas did not make any public policy argument for not applying the definitional exclusion as to the facts of this case, the Court of Appeals held that the trial court did not err in granting summary judgment in State Farm and affirmed the trial court's decision.

3. *Malladi Sudhakar Reddy, M.D. v. Dianna Lynn Veedell and Maury Veedell* (Tex. Ct. Appeals, 5th Dist., Sept. 18, 2014).

This lawsuit arises out of an automobile accident in which Dianna Lynn Veedell was injured when her bicycle was struck by a car driven by Dr. Malladi Sudhakar Reddy while backing. The Court held that the bicyclist's negligence claim against a "distracted doctor" driver who caused a vehicular collision is not a "health care liability claim" subject to the Texas Medical Liability Act. They held that the trial court correctly denied Dr. Reddy's motion to dismiss and overruled his sole issue requiring her to file an extra report to establish a Texas Medical Liability Act claim affirming the interlocutory order of the trial court. (You may have an idea of the conclusion by the reference to a car driven by a "distracted doctor" and the rendition of the facts that this is not going to favor the doctor.)

Dianna and Maury Veedell ("Veedells") sued Dr. Reddy for negligence and negligence per se arising from a collision between Dr. Reddy's car and Dianna Veedell's bicycle. The Veedells allege that while Dr. Reddy was looking at his mobile phone he backed his car into a

road and collided with Dianna Veedell's oncoming bicycle, propelling her into and shattering the rear window of the doctor's car. The Veedells allege that Dr. Reddy failed to keep a proper lookout, backed unsafely and in a manner that interfered with other traffic, failed to yield the right-of-way, and that he violated sections of the Texas Transportation Code which prohibited backing a vehicle "unless the movement can be made safely and without interference with other traffic." See, § 545.415(a) Tex. Transp. Code Ann. (West 2011).

Dr. Reddy moved to dismiss the lawsuit pursuant to § 74.351(b) Tex. Civ. Prac. & Rem. Code Ann. (West Supp. 2014) arguing that the Veedells claimed that he "a physician, acted unsafely in the operation of his motor vehicle" saying that by making such allegations, they constituted a healthcare liability claim subject to the Texas Medical Liability Act (the "Act"). Dr. Reddy went on to say that a healthcare liability claim under the Texas Medical Liability Act required the Plaintiffs to file an expert report to establish that her claim was not frivolous. Failure to produce the expert report warranted dismissal. Dr. Reddy went on to argue that the case does involve healthcare liability claims because (1) he is a physician, (2) the Veedells' claims pertained to "safety", and (3) the Plaintiffs' "healthcare liability claim, means a cause of action against a healthcare provider or physician for treatment, lack of treatment or other claimed departure from accepted standards of medical care, or healthcare, or safety, or professional, or administrative services directly related to healthcare, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract. Dr. Reddy also argued that the Plaintiffs' claims met the "indirect-relation" standard because the phone call that dispatched him was from a hospital he worked at. Evidence to support this argument was limited to Dr. Reddy's own deposition that the caller "was the hospital, I believe." The Plaintiffs argue that their claims are not a healthcare liability claim and that there is no connection, even indirect at best, between the safety claim and the provisions of the healthcare for this claim to fall under the Act.

The trial court denied Dr. Reddy's motion to dismiss and he filed an interlocutory appeal. The sole issue was whether or not the Plaintiffs' complaint constitutes a "safety" claim under the Act and that the trial court erred in concluding otherwise, therefore, the case should have been dismissed for failure to satisfy the statutory requirement of filing an expert report summarizing the applicable standards of care, the manner in which those standards were not met, the causal relationship between that failure and an injury claim. See §§ 74.001(a)(13) and 74.351(b), (r)(6) Tex. Civ. Prac. & Rem. Code Ann. (West Supp. 2014). The Court relied on *Williams v. Riverside General Hospital, Inc.*, No. 01-13-00335-CV, 2014 WL 4259889 (Tex. App. – Houston [1st Dist.] Aug. 28, 2014, no pet. h.) involving a nursing assistant who sued her hospital employer for personal injuries arising from two on-the-job incidents: tripping over an extension cord left out by a co-worker, and slipping on a hospital floor due to a substance emitted by "a leaky piece of lab equipment". The Court in the *Williams* case reasoned that a personal injury claim arising from tripping on an extension is "a garden variety slip and fall claim that is completely untethered from the provision of health care" and that "the same holds true" for a claim based on slipping on the hospital floor. *Id.* at 7. In this case, the Veddells alleged that Dr. Reddy was negligent by looking at his mobile phone while backing into a public street, failing to keep a proper lookout, backing unsafely in a manner and in a manner that interfered with other traffic, failing to yield right-of-way, and violation of the Texas Transportation Code. Reviewing the facts of the case, the Court felt that this case was essentially indistinguishable from *Williams*

v. Riverside insofar as the claims may be characterized as "garden-variety" personal-injury claims that are "completely untethered from the provision of health care." Accordingly, this does not qualify for the "safety" category of health care liability claims in that the trial court correctly denied Dr. Reddy's motion to dismiss.

***Nabors Well Services, Ltd. F/K/A Pool Company Texas, Ltd. v. Romero*, et al**
(Tex. Sup. Ct., No. 13-0136, March 25, 2014)

Nabors Well Services, Ltd. F/K/A Pool Company Texas, Ltd. appeals a jury verdict that awarded actual damages of more than $2.3 million to the Romero and Soto families as a result of an automobile accident on December 20, 2004. Nabors Well Services, Ltd. on appeal brought before the Texas Supreme Court a single issue that the trial court abused its discretion by excluding expert and lay testimony regarding the use or nonuse of seat belts in a roll-over automobile crash.

Suit was brought by Asuncion Romero, Individually and as Representative of the Estate of Aydee Romero, Deceased, and as Next Friend of Edgar Romero and Saul Romero; Esperanza Soto, Individually and as Next Friend of Esperanza Soto, Guadalupe Soto, Maria Elena Soto; and Martin Soto against Nabors Wells Services, Ltd. F/K/A Pool Company Texas, Ltd. and Lauro Bernal Garcia, as a result of an automobile accident that occurred in the late afternoon of December 20, 2004. At that time, Martin Soto, age 53, was driving a Chevrolet Suburban, which is a light truck utility vehicle, with seven family members as occupants. Lauro Garcia, a Nabors' employee, was driving southbound in a company tractor-trailer. As the vehicle being driven by Martin Soto overtook and began to pass the Nabors' vehicle, the Nabors' driver turned left to turn off the highway and the tractor's front left bumper struck the Chevrolet Suburban, which careened off the highway. The Suburban rolled over multiple times before coming to rest upright. Most of the Chevrolet Suburban's occupants were ejected.

Martin Soto; his 48 year old wife, Esperanza; their 15 year old twins, Esperanza and Guadalupe Soto; 9 year old Marielena Soto; 8 year old Edgar Romero; and 4 year old Saul Romero all suffered injuries. At the time of the accident, Marielena and Esperanza Soto were unconscious with head injuries. Aydee Romero died as a result of the accident.

The record conflicts as to who was wearing seat belts at the time of the collision. James Matthies, a Texas State Trooper, recorded after the fact that all the Chevrolet Suburban occupants were unrestrained except Marielena Soto and Esperanza Soto, the wife. According to the deposition testimony of Marielena Soto and Esperanza Soto, the mother, they were not wearing seat belts. Martin and Guadalupe testified that they were wearing their seat belts and Esperanza Soto, the daughter, testified that she was not wearing a seat belt.

When the seat belt laws were first proposed, they were vigorously opposed as an unjustified governmental intrusion into individuals' private lives. One of the compromises made to gain the passage of the law was an agreement that the failure of an accident victim to wear a seat belt could not be used to reduce the victim's damages. The concern was that insurance companies would use the failure to wear a seat belt as an excuse to refuse to pay legitimate

claims. The seat belt law was repealed in 2003, and so the Texas Supreme Court, for the first time, considered the issue.

In a 24 page decision delivered by Justice Brown, the Court rationalized that now that seat belts were required by law and had "become an unquestioned part of daily life" for the vast majority of drivers and passengers. "These changes have rendered our prohibition on seat belt evidence an anachronism". The Court ruled that today it is a vestige of a "bygone legal system and an oddity in light of modern societal norms". The Court that relevant evidence of use or non-use of seat belts is admissible for the purpose of appointing responsibility in civil lawsuits.